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IMPORTANT OPINION.

ATLANTIC & PACIFIC RAILROAD vs. J. T. LESUEUR.

BY JAMES H. WRIGHT, CHIEF JUSTICE.

In the District Court of the Third Judicial District of the Territory of Arizona, sitting at Prescott, in Yavapai County, to hear and determine causes arising under the Constitution and Laws of the United State; June term, 1887.

Atlantic and Pacific R. R. Co., plaintiff.
versus
J. T. Lesueur, Treasurer and ex-Officio Tax Collector of Apache County, Territory of Arizona, Def't.

In Equity.

Mr. William C. Hazledine, Solicitor, and Messrs. Rush, Wells and Howard, Attorneys for Plaintiff.

Messrs. D. P. Baldwin and Harris Baldwin, Attorneys for Defendant.

(Continued.)

It is to be observed that the exemption clause of the Atlantic and Pacific R. R. Co. is identical with that of the Northern Pacific R. R. Co. That language is as follows: "And the right of way shall be exempt from taxation in the territories of the United States.' This is all there is importing exemption in either charter. The naked right of way is exempt; that is all. Not one word is said about exempting any other property, except the right of way. See section 2 of the plaintiff's charter. Is it possible, without giving this language a strained construction or enlarging its meaning by implication, to make it compass all the improvements, etc., erected by plaintiff on its right of way? But nothing can be supplied or inferred. If it had been in the legislative mind, if congress had intended to exempt all these improvements, would not some such language have been employed as this: "And the right of way and all improvements made thereon shall be exempt from taxation in the territories of the United States." In passing upon plaintiff's claim to exemption, shall I imply what congress has failed to supply? Does not the Montana decision do this? Does it not, by implication, supply the clause, "and all improvements erected thereon," or something of equivalent import. Now, congress did not grant the fee to plaintiff in granting it the right of way over the public lands. It is not true, we apprehend, as claimed by plaintiff's learned solicitor, that the grant of the right of way to a railroad is sui generis—that as a development of the nineteenth century, it has a peculiar and enlarged meaning or legal significance. We think the grant by congress to plaintiff of its right of way, was simply the conferring of an easement, with no larger legal meaning than the granting to an English boat company the right of way to construct a channel in the river Thames three hundred years ago. It had then, as it has now, a definite legal significance. We are not aware that it has ever been held to be more significant when conferred by the holder of the fee upon one class of persons than when conferred upon another class. Reason is the life of the law—conscience is the vital principle of equity. The law, in its purity and justice, makes no invidious distinctions; certainly equity does not. Why should an easement, when conferred upon a corporation vouchsafe any larger estate than when conferred upon a private individual? Both are persons, the one natural, the other artificial. One may represent aggregated, the other individual capital. But is there any good reason why aggregated capital should be clothed with a greater degree of immunity than individual capital? Easement means now what it has always meant. It is a privilege, or right, conferred by grant, or otherwise, to go upon, or pass over, the land of another for a specified purpose; and the measure of the easement is the extent of that specified purpose;

poses a superior estate in another. One needs no easement or right of way on his own lands. It implies a servient and dominant estate. Mr. Washburn, in his work on Easement and Servitudes, 3d edition, chapter 1, section 1, gives this definition of an easement, and this definition has been accepted ever since as the standard rule:

First. It is incorporeal.

Second. It is imposed on corporeal property, and not on the owner thereof.

Third. It confers no right to a participation in the profits arising from such property.

Fourth. It is imposed for the benefit of corporeal property.

Fifth. There must be two distinct tenements or estates, the dominant and servient.

He then says: "The grantee of such an easement is not the owner, or occupant of the estate over which the way is used." And on page 10, he says: "If at any time these estates are united under one ownership and possession, the easement is at once extinguished. Now, it is true that the right to take private property for public uses is an inherent right of sovereignty; and exists in every independent government; it is equally true that the use of lands, taken for the purpose of constructing a railroad, is a public use, although taken by a private corporation to subserve its own interests. But where the right of way is thus taken by the exercise of a power of eminent domain, or where it is granted voluntarily by private deed, or as in the case at bar, by legislative enactment; in either, or in all, is not the right of way acquired, simply an easement for a specific purpose—neither method, in obtaining of which, need be used, if the title—the fee were already vested in the corporation? And although reaching to the reductis ad absurdeum, is not the conclusion unavoidable that, if the Atlantic & Pacific R. R. Co., in obtaining its charter from congress, granting it the right of way for its railroad, thereby acquired the absolute title in fee to the 200 foot strip of public land through this territory, then the plaintiff has no easement therein at all—the same being extinguished by acquiring the fee, or servient estate. And, carrying the absurdity still further, as a right of way is an easement, having no easement, therefore it has no right of way.

We have felt constrained to say this much on the subject of easement, for the reason that plaintiff's counsel lays much stress on this point, and makes a learned and ingenious argument to show that, under this new feature of jurisprudence, the right of way, granted plaintiff by congress, is more than an ordinary right of way; that it is an absolute fee simple title to the land. But, even admitting that the language used by the act of congress did vest the fee, we think it would by no means follow that these improvements would be exempt from taxation. Indeed, we think they would not be. True, congress has the absolute disposal of the public lands; but has congress curtailed the sovereignty of the territorial government to the extent of absolutely disrobing it of the taxing power, without manifesting plainly and unequivocally the legislative will? We think not. It was intended, and is essential, that the taxing power should be concurrently wielded by the federal and territorial governments. Suppose, as is largely true in this territory, that all the lands in the taxing district were public lands, and that congress, in conferring the fee thereof upon the various grantees, should do, as it is claimed has been done in this case—not only grant the fee to the lands, but exempt the same from

not the taxing power be dismantled of the essential habiliments of sovereignty? Whence would come the territorial revenues—the life-blood of the territorial government and the great lubricator of its machinery? Would not such a government perish, divested thus of its vital resources? Here we apprehend is one reason of the law—that the most liberal intendments and the strongest presumptions will be indulged in favor of the right of taxation. Here, too, is a correlative reason of the law—that, in construing legislative exemptions from taxation, there are no presumptions, no intendments, no implications, nothing, save what the very terms of the statute creating the exemption irresistibly import. Under this rule does not the Montana decision go too far? Now, Judge Cooley, on page 204 of his great work on taxation, says: "Taxation is the rule—exemption the exception." Mr. Welty on assessments lays down this doctrine; that where exemptions from taxation by legislative enactment is claimed, the act creating the exemption must be strictly construed. Way back in the case of the Philadelphia & Wilmington railroad vs. Maryland, 10 Howard, 376, Chief Justice Taney used the following language: "This court on several occasions has held, that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambigious terms." At a still earlier date—4th Peters, 514, in a case that became famous by reason of the great opinion of Chief Justice Marshall, viz: "The Providence Bank vs. Billings"—these words are used: "that the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to affirm. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." If we look to the language of the second section of plaintiff's charter exempting it from taxation, what is exempt besides the right of way? So in 116 U. S 665, Railroad Co. vs. Damis. Mr. Justice Gray, speaking for his associates, said: "It has been said that neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken; that exemption from taxation will not be assumed, unless the language is too clear to admit of doubt; that nothing can be taken against the state by presumption or inference; the surrender when claimed, must be shown by clear, unambigious language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state; that a state cannot, by ambigious language, be deprived of this highest attribute of sovereignty; that any contract of exemption is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded as "in derogation of the sovereign authority, and of common right, and therefore, not to be extended beyond the exact and express requirements of the grants, construed strictissimi juris." And in one of the very latest cases (March, 1887,) decided by this great tribunal of final resort, Mr. Justice Harlan said: "It is the settled doctrine of this court that an immunity from taxation by the state will not be recognized, unless granted in terms too plain to be mistaken."

diciary of this territory—the Supreme Court of California—in the case of Cottle vs. Spitlzer, 56 Cal., 459, says: "In the wide range taken in the argument of this case, much was said in relation to the beneficent policy of the law, in encouraging certain branches of industry by exemption from taxation; and that such supposed exemption ought to be encouraged, and passages in the organic law so construed as, if possible, to effectuate that object. The disposition of the question involved does not require an examination into the expediency or inexpediency of that kind of enactment, but it may not be out of place to here remark that, if the correct principles of free government require that taxation should be equal, it is at least possible that the advantage gained, in the direction of fostering a particular industry, or set of industries, at the expense of others may be outweighed by the general injury resulting in the downfall of one of the pillars of the temple of liberty." And finally, coming to the supreme court of this territory, Chief Justice Shields, in Waller vs. Hughes, 11th Pacific Reporter, 122, uses this strong language: "A mere inference that certain property is exempt from taxation, will never do; nor will it be assumed, unless the language is too clear to admit of doubt. No property within the territory is exempt from the operation of these revenue laws, unless put beyond them designedly and unequivocally by the legislature, or other sovereign power."

Hence, with the profoundest respect for the learning of Chief Justice Wade, we have been unable to escape the conclusion, that so much of the decision, in the Carland case, as declares that section 2 of the act of congress, granting the right of way to the Northern Pacific R. R. Co., and exempting it from taxation in said territories, the road-bed, ties and rails thereto attached, and all the station buildings, workshops, etc., necessary for constructing and operating said railroad, is erroneous, and at variance with the well settled rule of law, that these exemptions should be strictly construed. Hence, we are also clearly of the opinion, that section 2 of the act of congress, granting the right of way to the Atlantic & Pacific R. R. Co. over the public lands through Apache county, and exempting the same from taxation in the territories of the United States, does not carry it with it and exempt from taxation, in said county, the company's road-bed, ties, rails, etc., nor any of the buildings or other improvements, attached to and constructed upon its said right of way in said county; nor the rolling stock, telegraph, etc., of plaintiff therein, if otherwise taxable. See Detroit Young Men's Society vs. Mayor, etc., of Detroit, 3d Mich., 171; Cottle vs. Spitizer, 65 Cal., 336; People vs. Eddy, 43 Cal., 456; Buffalo City Cemetery vs. City of Buffalo, 46 N. Y., 508; Macon vs. Central R. R. Co., 50 Ga., 620; Waller vs. Hughes, supreme court of Arizona, found in 11 Pacific Reporter, 122; Welty on assessment, section 169; Conley on taxation, pp. 184, 204 to 207; Hoge vs. Railroad Company, 99 U. S., (9th Otto,) 348; Vicksburg, Shreveport & Pacific R. R. Co. vs. Dennis, 116 U. S., 665; C. B. & K. C. R. R. Co. vs. Guffey, 120 U. S., 569; Northern R. R. Co. vs. Gould, 21 Cal., 259.

Second, Plaintiff next claims that its movable personable property, its rolling stock was exempt in Apache county because the domicile of plaintiff was at Albuquerque, New Mexico, that being the principal place of business for plaintiff's western division, such property being taxable only at the domicile or residence of the owner.